No. 08-1315

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IN THE

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, G. STEVEN GEIS and CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND and CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, On Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Third Circuit erred in finding, consistent with authority from this Court and precedent from other Courts of Appeals, that investors are not placed on inquiry notice of the facts constituting a Securities Exchange Act of 1934 §10(b) securities-fraud violation by publically-available facts suggesting a good-faith disagreement over scientific methodology.

Whether the Third Circuit failed to engage in the analysis required by *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), when it held that the Amended Complaint, examined as a whole, pleads facts raising a strong inference of deliberate misconduct that is cogent and at least as compelling as any competing inference.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Under 28 U.S.C. §1658(b), a federal securities-fraud claim must be filed "not later than the earlier of—(1) 2 years after the discovery of the facts consti-

tuting the violation; or (2) 5 years after such violation." 28 U.S.C. §1658(b).

This Court holds that fraudulent intent, or "scienter is an element of a violation of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." *Aaron v. SEC*, 446 U.S. 680, 691 (1980); *accord Basic Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) (citing *Aaron*, 446 U.S. at 691); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Thus, one of the critical facts necessary to constitute any violation of §10(b) of the Securities Exchange Act of 1934 ("1934 Act") is fraudulent intent or scienter. "To establish liability under §10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, 'a mental state embracing the intent to deceive, manipulate, or defraud.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (quoting *Ernst & Ernst*, 425 U.S. at 193-94 & n.12); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (§10(b) requires "*scienter*, *i.e.*, a wrongful state of mind") (emphasis in original). As the Third Circuit aptly put it in this case, "[s]cienter is not incidental to §10(b), it is elemental." Pet. App. 13a.

This case is one in which investors who followed Pharmacia might have learned in February 2001 of a technical dispute between the Food and Drug Administration ("FDA") and Pharmacia about the best way to analyze data from a clinical study. But such a dispute does not, by itself, suggest that fraud was afoot. Pet. 28. Petitioners concede as much when they argue that the case should have been dismissed for failure to plead scienter. Pet. 31-32. They insist their misleading statements, when considered in context, "reflected nothing more than a legitimate

interpretation of scientific data, and a scientific dispute over competing interpretations of data cannot give rise to a strong inference of scienter," Pet. 34, and that innocent explanations for their misleading statements "overwhelm any inferences of fraudulent intent." Pet. 6, 31.

In fact, nothing in the public domain suggested fraud to reasonable investors of ordinary intelligence until August 5, 2001, when the *Washington Post* published a story entitled "Missing Data on Celebrex: Full Study Altered Picture of Drug." JA:0203-04. In that article, the public learned for the first time that Petitioners had intentionally withheld critical data from a medical journal's editors and peer reviewers, thereby deliberately misleading the journal, the medical community, and public investors. JA:0203-04. This article was, as the Third Circuit found, the first indication, to reasonable investors of ordinary intelligence, that Petitioners' conduct might involve fraud, and thus Respondents' original complaint, filed less than two years after the article's publication, was timely under §1658(b).

Petitioners identify no material split among the circuits, all of which hold that inquiry notice requires notice of facts suggesting the possibility of fraud. In the absence of a potentially consequential disagreement among the lower courts, there is no need for this Court's review.

Nor is there any reason to review the Third Circuit's determination that, "[w]hen examined as a whole . . . the Amended Complaint is replete with allegations . . . of scienter." Pet. App. 19a (citing and following *Tellabs*, 551 U.S. at 321-23). The Third Circuit explicitly cited and faithfully followed the standard this Court set forth in *Tellabs*.

STATEMENT OF THE CASE

A. Facts

This securities-fraud class action arose because Petitioners materially misrepresented the safety and commercial viability of Pharmacia's blockbuster drug, Celebrex. Specifically, Petitioners misled a leading medical journal and told medical professionals and the investing public that data from a long-term safety study (the "CLASS" study) established Celebrex's superior safety profile. In truth, when the full results were analyzed, the CLASS study showed *no safety advantage* for Celebrex over less-expensive drugs. Petitioners fabricated supposedly favorable study results by arbitrarily restricting analysis to the data from only the first six months of the study.

By truncating the results to six months—as part of a so-called "alternative analysis"—Petitioners made it look as though Celebrex was safer than its comparators. Using these manipulated results, Petitioners touted Celebrex's superiority in a manuscript published by the *Journal of the American Medical Association* ("*JAMA*"), in press releases, conference calls, and presentations at medical conferences throughout the Class Period.

Petitioners tell this Court, "[i]n April 2000, Pharmacia publicly disclosed the results" of the CLASS trial. Pet. 7. But Pharmacia's April 17, 2000, press release was inherently misleading. It stated:

> In a landmark study to assess the overall long-term safety of the COX-2 specific inhibitor Celebrex . . . arthritis patients taking four times the recommended osteoarthritis . . . dose of the drug experienced fewer symptomatic gastrointes-

> tinal . . . ulcers and ulcer complications than patients taking ibuprofen and diclofenac . . . .

JA:0050-55, at 50. Nowhere did Petitioners' press release disclose what later came to light: that the "compelling" findings it described were, in truth, negated by the full study results. Pet. App. 5a.

Petitioners also say that "Pharmacia disclosed that Celebrex failed to meet the objectives of the original CLASS protocol," citing an *analyst's* report that did not even remotely suggest that the ostensibly favorable outcome could be supported only by truncating and manipulating the data. Pet. 7. Much more than merely "suggest[ing] the possible superiority of Celebrex," as Petitioners put it now, Pet. 7, Petitioner Hassan told securities analysts in April 2000: "[W]e now have *exciting new data* that shows that *Celebrex has a truly exceptional safety profile.*" JA:0059 (emphasis added).

Petitioners continue: "In September 2000, *Petitioner Geis and 15 other doctors and scientists not employed by Pharmacia* published an article regarding the results of CLASS in the Journal of the American Medical Association (the '*JAMA* Article')." Pet. 8 (citing JA:0039-47) (emphasis added). In fact, *six* of its sixteen authors were Pharmacia employees, and the rest were Pharmacia's paid consultants.[1] "All

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[1] JA:0046. The article states:

> Financial Disclosures: Ms Burr and Drs Zhao, Kent, Lefkowith, Verburg and Geis are employees of Pharmacia, manufacturer of celecoxib. In addition, all authors who are not Pharmacia employees are paid consultants for Pharmacia.
>
> Funding/Support: This study was funded by Pharmacia.

Id.

authors," the *Washington Post* subsequently observed, "were either employees of Pharmacia, Celebrex's manufacturer, or paid consultants of the company." JA:0203.

Anxious for a peer-reviewed publication which would, as an FDA official later told the *Washington Post*, "confirm[] the hype," JA:0204, Petitioners deliberately concealed from *JAMA*'s editors the fact that more study data was available than what they sought to publish, and that the full study negated the positive outcome they reported. Pet. App. 5a; JA:2110-2113, at 2111. As a consequence, *JAMA* published the article, which misleadingly described the study and its results, in September 2000. Pet. App. 5a; JA:0039. The article became a key marketing tool in Petitioners' efforts to promote Celebrex and its supposed safety advantage, as Petitioners distributed over 30,000 copies of it. JA:0756-57, at 757; JA:2271.

Petitioners submitted the full CLASS data to the FDA when they asked the agency to remove certain gastrointestinal warnings from Celebrex's label. Pet. App. 5a; JA:2224. Petitioners urged the FDA and its consultants to ignore the data after the six-month timepoint, asserting—falsely—that the later data was unreliable. Pet. App. 6a. Three FDA staff reviewers who examined the full-study data were not persuaded. Pet. App. 6a-7a. On February 6, 2001, the FDA posted both Petitioners' "Briefing Document," which described their "alternative analysis," and the staff reviewers' reports, to its website. Pet. App. 5a-7a. An Advisory Committee—a panel of independent experts whose function is to advise the FDA—met on February 7, 2001, to consider the data, and concluded that it did not warrant Petitioners' requested label change. Pet. App. 7a.

Contemporaneous public debate suggested only an honest disagreement over statistical data and scientific methodology—as Petitioners themselves acknowledge when they argue that the operative complaint fails to allege facts showing fraud. *See* Pet. 28-34. Not until August 5, 2001, when the *Washington Post* article appeared, did reasonable investors of ordinary intelligence have any cause to suspect Petitioners had deliberately concealed information or intentionally misstated the results of the CLASS study.

The August 5, 2001, article, which took months of investigation supported by the resources of the *Washington Post*, revealed that defendants had deliberately concealed the full-study data from *JAMA*'s peer reviewers and editors. *JAMA*'s editor-in-chief told the *Washington Post*: "'I am disheartened to hear that they had those data at the time that they submitted [the manuscript] to us . . . . We are functioning on a level of trust that was, perhaps, broken.'" JA:0203. "'We were flabbergasted,'" declared M. Michael Wolfe, a Boston University gastroenterologist and *JAMA* peer-reviewer who had written a favorable editorial to accompany the misleading study results. JA:0203. "'I am furious,'" he told the *Washington Post*, "'I looked like a fool . . . . But . . . all I had available to me was the data presented in the article.'" JA:0203.

The *Washington Post* further revealed that discovery of Petitioners' deliberate deception had induced *JAMA*'s editors to change the journal's editorial policy and to henceforth require from all authors a *sworn statement* taking "'responsibility for the integrity of the data and the accuracy of the data analyses.'" JA:0203. And *JAMA*'s chief editors have

more recently lamented that the public's confidence in medical research remains "in great jeopardy" due to the "manipulation of studies and publications by the pharmaceutical and medical device industries"—naming Petitioners' CLASS article, that it had published, as a primary example. DeAngelis and Fontanarosa, "Impugning the Integrity of Medical Science: The Adverse Effects of Industry Influence," 299 *JAMA* 1833-35 (Apr. 16, 2008).

Respondents, who had purchased Pharmacia stock at prices affected by the fraud, filed their original complaint for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934, on April 7, 2003, roughly 18 months after the *Washington Post* exposed wrongdoing, and well within the periods prescribed by 28 U.S.C. §1658(b), which requires filing "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

B. Proceedings Below

After the district court consolidated several related actions, Petitioners moved to dismiss the consolidated case, insisting that the facts recited in the complaint could raise no inference of fraudulent intent, because "interpretations of scientific data . . . are inherently subject to varying interpretations." Motion to Dismiss Consolidated Amended Class Action Complaint, Docket No. 41, at 37. Thus, Petitioners argued, "a disagreement over the proper interpretation of scientific study results cannot, as a matter of law, establish scienter." *Id.* at 38.

Respondents opposed this motion, pointing out that the events described in the complaint, which had come to public attention following the August 2001,

Washington Post article's publication, amounted to something other than an honest scientific dispute. Brief in Opposition to Motion to Dismiss, Docket No. 44, at 13. The district court denied Petitioners' motion. Pet. App. 37a.

Thereafter, the district court certified a class of investors who purchased Pharmacia stock between April 17, 2000, and February 6, 2001. Although Respondents had asked for a longer Class Period, the district court found that the information posted to the FDA website on February 6, 2001, constituted a "curative disclosure." JA:0014. Petitioners then moved for summary judgment, arguing that in light of this finding, the suit, which was filed April 7, 2003, was untimely. The district court granted Petitioners' motion. Pet. App. 35a-36a.

Following entry of final judgment, Respondents appealed from the district court's orders truncating the Class Period and entering summary judgment. Petitioners cross-appealed, complaining that their motion to dismiss was improperly denied as Respondents could allege no facts showing the fraudulent intent required for a violation of §10(b).

On appeal, the Third Circuit reversed the summary judgment. Investors are not placed on inquiry notice of §10(b) claims, the court explained, until "'they ha[ve] sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity.'" Pet. App. 10a (quoting *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006)). "For inquiry notice to take hold, there must be some indicia of potential malfeasance." Pet. App. 18a. But on the record in this case, "there was no indication that [Petitioners] deliberately withheld data from *JAMA*, or improperly

massaged the data, until the *Washington Post* article in August 2001." Pet. App. 16a. Because the *Washington Post* article "raised the red flag of impropriety," placing reasonable investors on inquiry notice of potential §10(b) claims less than two years before they filed suit, Respondents' claims were timely. Pet. App. 8a, 18a. The Third Circuit accordingly vacated the district court's entry of summary judgment. Pet. App. 18a.

Having already discussed the record facts of this case at some length, the Third Circuit disposed of Petitioners' contention on cross-appeal that Respondents never pleaded facts raising the strong inference of scienter required to proceed with securities claims under *Tellabs*. *"When examined as a whole,"* the court observed, "the Amended Complaint is replete with allegations that defendants acted with the requisite scienter." Pet. App. 19a (emphasis added). The Third Circuit weighed Petitioners' contention that the case presented nothing more than a "legitimate disagreement over scientific data," and then held that Respondents' allegations of deliberate concealment and calculated prevarication illustrated not a *legitimate* scientific dispute, but a "bad faith misrepresentation of scientific data." Pet. App. 20a. This was "sufficient to withstand . . . 'requirements' . . . that the allegations give rise to a strong inference of scienter." Pet. App. 20a (citation omitted).

REASONS FOR DENYING THE WRIT

Petitioners offer no credible reason why this Court's review is needed. Petitioners portray a "substantial split" of authority as to what an investor must know to be placed on inquiry notice of a potential securities-fraud claim, Pet. 13, but the purported conflicts are illusory. In the context of

§10(b) actions, lower courts uniformly require that facts available to an investor suggest *wrongdoing* in order for the investor to be deemed on inquiry notice of her potential claims. This requirement comports with this Court's decisional authority, and the plain language of §1658(b). *See infra* at 11-29.

Furthermore, the Third Circuit accurately and explicitly followed this Court's precedent in *Tellabs* in reviewing the district court's denial of Petitioners' motion to dismiss. *See infra* at 29-32.

There is no need for this Court's review.

A. The Decision Below Comports with the Plain Language of §1658(b)

Congress has provided that a securities-fraud claim is timely if filed by "the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. §1658(b).

Prior to §1658(b)(1)'s enactment in 2002, this Court held in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), that §10(b) claims were governed by the limitations provisions of 1934 Act §9(e), requiring actions to be "brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. §78i(e). This Court further held that "[t]he 1-year period, by its terms, *begins after discovery of the facts constituting the violation, making tolling unnecessary*." *Lampf*, 501 U.S. at 363 (emphasis added). And even before *Lampf*, circuit-court decisions had long held that, in an action under §10(b), the knowledge which will start the limitations period is "'that of "the *facts* forming the *basis* of [the] cause of action"'" such that "'the aggrieved party has either

knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof." [2]

The statutory limitations period, by its terms begins only "after the discovery of the facts constituting the violation," 28 U.S.C. §1658(b)(1), but there is, of course, no *violation* of §10(b) without fraudulent intent or "scienter." Indeed, this Court holds "that scienter is an element of a violation of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." *Aaron*, 446 U.S. at 691; *accord Basic*, 485 U.S. at 240 n.18 (quoting *Aaron*, 446 U.S. at 691). Because an innocently (or negligently) false or misleading representation is not a violation of §10(b), *see Aaron*, 446 U.S. at 691, the statute does not begin to run until investors have good reason to believe that the defendant in fact acted with scienter. *Law v. Medco Research*, 113 F.3d 781, 786 (7th Cir. 1997); *see also Young v. Lepone*, 305 F.3d 1, 10 (1st Cir. 2002). The Third Circuit noted below that in contrast to certain other securities claims, §10(b) requires a plaintiff to prove scienter. Pet. App. 13a n.4. "This is a distinction with a difference, both in terms of what a plaintiff must show for recovery *and* in terms of what infor-

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[2] *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (emphasis in original; citations omitted); *see also Durham v. Business Mgmt. Assocs.*, 847 F.2d 1505, 1508 (11th Cir. 1988) (statute of limitations in §10(b) action commences "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the alleged violations"); *Johns Hopkins Univ. v. Hutton*, 488 F.2d 912, 917 (4th Cir. 1973) ("'discovery' means either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation") (quoting *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959)).

mation must be available for inquiry notice to take hold." Pet. App. 13a n.4 (emphasis in original); *accord Law*, 113 F.3d at 786-87.

B. Petitioners Have Not Identified a Genuine Conflict Among the Circuits with Respect to Inquiry Notice

Petitioners' purported "split of authority" fails to identify meaningful differences. In the Fourth and Eleventh Circuits, they say, the limitations period begins to run as soon as "'storm warnings' of '*possible' fraud*" exist, whereas "[t]he Fifth and Eighth Circuits appear to trigger the limitations period as soon as a plaintiff is on notice of 'storm warnings' of *possible fraud*, provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period." Pet. 13, 14 n.4 (emphasis added). In the First, Sixth, Seventh and Tenth Circuits, Petitioners say, the limitations period commences "when the plaintiff becomes aware, through 'storm warnings' or otherwise, of *the possibility that it has been defrauded* and, having exercised reasonable diligence, should have discovered facts underlying the fraud," with the Second Circuit following this approach too unless the investor fails to make a reasonable inquiry. Pet. 14 (emphasis added).

Petitioners acknowledge that "[t]he Third Circuit purports to follow a similar approach." Pet. 15. So does the Ninth Circuit when it holds that an investor "is on inquiry notice when there exists sufficient *suspicion of fraud* to cause a reasonable investor to investigate the matter further." *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 876 (9th Cir. 2008), *pet. for cert. filed*, No. 07-1489 (May 27, 2008) (emphasis added).

Petitioners thus appear to concede that all circuits require meaningful indications of *possible fraud* to place investors on inquiry notice of §10(b) claims. And because scienter is an indispensible element of fraud, *see Aaron*, 446 U.S. at 691, all circuits require an indication of scienter in order to trigger inquiry notice.

This Petitioners deny, asserting that in all but the Third and Ninth Circuits, "storm warnings" may consist of *any* information that contradicts defendants' prior representations, whether or not any facts exist to suggest dishonesty. Pet. 15, 24. The precedents, however, demonstrate this is not true; they reflect a uniform requirement that the plaintiff be aware of genuinely *suspicious circumstances*, and that contradictory facts coming to investors' attention must suggest the *possibility of fraud* before the statute of limitations will begin to run.[3] The Third and Ninth

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[3] *See Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002) ("storm warnings" must "alert" investor that "fraud [is] in the wind"); *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003) (information must suggest probability of fraud); *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 427 (2d Cir. 2008) ("Inquiry notice may be found as a matter of law only when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct."); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1262 (4th Cir. 1993) (information susceptible to "different interpretations" cannot create inquiry notice as a matter of law); *Sudo Props. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371, 376 (5th Cir. 2007) (information that does not create inference of bad faith does not trigger inquiry notice); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (requiring knowledge of "suspicious facts"); *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (requiring "suspicious circumstances"); *LaSalle v. Medco Research*, 54 F.3d 443, 446 (7th Cir. 1995) (information must

Circuits agree with the national consensus that the limitations period does not begin until plaintiff knows or should know "that a *fraudulent* misrepresentation has been made."[4]

This is not to say that a plaintiff must be aware of "evidence supporting *each element of its claim*," in order for the limitations period to start running. Pet. 16 (citing *Betz*, 519 F.3d at 867-68 (Kozinski, C.J., dissenting)). Petitioners conflate the terms "viola-

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give rise to an "inference of probable misrepresentation"); *Marks v. CDW Computer Ctrs.*, 122 F.3d 363, 368 (7th Cir. 1997) (inquiry notice arises when plaintiff should discover fraudulent conduct); *Great Rivers Coop. v. Farmland Indus.*, 120 F.3d 893, 897 (8th Cir. 1997) (same); *Sterlin v. Biomune Sys., Inc.*, 154 F.3d 1191, 1203 (10th Cir. 1998) (facts must be "'calculated to excite inquiry'"); *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 968 (11th Cir. 2007) ("*Tello II*") (requiring specific factual information suggestive of fraud); *see also Bradley v. Nat'l Ass'n of Sec. Dealers Dispute Resolution*, 433 F.3d 846, 849 (D.C. Cir. 2005) (applying D.C. law to find inquiry notice does not arise until plaintiff has "*some evidence of wrongdoing*") (emphasis added); *cf. Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1308 (9th Cir. 1992) (finding under Nevada law that where defendants' state of mind is an element of plaintiffs' cause of action, plaintiffs' belief that statements were *innocently* made may toll the statute of limitations).

[4] *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (emphasis added); *see also Gray v. First Winthrop Corp.*, 82 F.3d 877, 880-81 (9th Cir. 1996) (same, and finding merely contradictory statements insufficient to create inquiry notice as a matter of law); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999) (information must raise "sufficient suspicion of *fraud*") (emphasis added); *Betz*, 519 F.3d at 871 (requiring "sufficient suspicion of *fraud*") (emphasis added); *In re NAHC, Inc., Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002) (requiring "'sufficient information of possible *wrongdoing*'") (emphasis added; citation omitted); *accord DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007); *Benak*, 435 F.3d at 397.

tion" and "claim," but the two are different.[5] A *violation* of §10(b) occurs when an individual engages in its proscribed conduct—*i.e.*, "when he or she employs manipulative or deceptive devices in connection with the purchase or sale of securities." *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 206 n.6 (3d Cir. 2001). A private §10(b) claim seeks reparation for the harm caused by the violation.[6] In order to establish a claim, a plaintiff must not only prove all of the elements of a violation of §10(b), but must also prove, *inter alia*, reliance, loss causation, and damages. *Dura Pharms.*, 544 U.S. at 341-42. Under §1658's plain terms, a plaintiff need not always possess evidence demonstrating these additional elements in order to be on notice of "the facts constituting the violation" of §10(b).

The dissent in *Betz* conflated "violation" and "claim," protesting that plaintiff "couldn't be on inquiry notice until she had solid proof of every single element of her 10b-5 *claim*." *Betz*, 519 F.3d at 867 (Kozinski, C.J., dissenting) (emphasis added). But the panel in *Betz* simply adopted the rule that

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[5] *See SEC v. Rana Research*, 8 F.3d 1358, 1364 (9th Cir. 1993) ("reliance is not an element of a Rule 10b-5 violation by misrepresentation; rather, it is an element of a private cause of action for damages implied thereunder"); *Schellenbach v. SEC*, 989 F.2d 907, 913 (7th Cir. 1993) (an action by the SEC for §10(b) violation "need not include proof of harm"); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (a violation of §10(b) does not require proof "that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money").

[6] *See SEC v. Tambone*, 550 F.3d 106, 130 (11th Cir. 2008) (unlike private plaintiff seeking to establish a claim for relief, SEC not required to show reliance, economic loss, or loss causation to establish §10(b) violation).

prevails nationwide: "A plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further." *Id.* at 876 (citing *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997); *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005) ("*Tello I*")). Thus, neither the Third Circuit, nor the Ninth, nor any other federal appellate court has ever held that the limitations period on §10(b) claims does not run until plaintiff has evidence of the additional *elements*, such as reliance or loss causation, that may be necessary to state a *private claim* for relief.

The statute and the decisional law say the statute begins to run upon "discovery of the facts constituting the *violation*"—which necessarily includes facts showing scienter. 28 U.S.C. §1658(b)(1) (emphasis added); *Aaron*, 446 U.S. at 691.

C. The Lower Courts Uniformly Require that Facts Available to an Investor Suggest Wrongdoing to Create Inquiry Notice of §10(b) Claims

Undaunted by the lack of genuine conflict among the lower courts, Petitioners accuse the Third Circuit of "depart[ing] from the overwhelming weight of authority" and, together with the Ninth Circuit, creating an inquiry notice standard that is the "functional equivalent" of actual notice because it requires some indication *of fraud*. Pet. 17.

Citing the Sixth Circuit's unremarkable holding in *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 502 (6th Cir. 2003), that "'*direct* evidence of scienter is not necessary to a determination of fraud,'" Petitioners conclude that "to constitute 'storm warnings,' information need

not indicate that the defendant acted with scienter." Pet. 16 (emphasis added). This hardly follows. Though "the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983), still it is fraud that must be shown. *Id.* at 389-90; *see Aaron*, 446 U.S. at 691; *Ernst & Ernst*, 425 U.S. at 193. In fact, the Sixth Circuit held in *New England Health Care* that the statute ran *because* the facts showed scienter: "In this case, we believe, the facts . . . *strongly suggest* that Fruit's auditors were *at least reckless*. . . . In the light of the particular allegations against Fruit, we are at a loss to understand why [plaintiff] should not have determined, by July 1, 1998, *that Ernst knowingly or recklessly* participated in the alleged fraud." 336 F.3d at 502 (emphasis added).

Petitioners cite the Eleventh Circuit's opinion in *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001), as "rejecting plaintiffs [sic] argument that she was not on inquiry notice 'because she could not reasonably have known . . . that the defendants had acted with . . . scienter.'" Pet. 16. And the Solicitor General, representing the United States as *amicus curiae* in *Betz*, takes *Theoharous* as suggesting that in the Eleventh Circuit, "suspicion of scienter is not required to constitute 'inquiry notice.'" *See* Brief for the United States as *Amicus Curiae* at 17 in *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. Apr. 22, 2009). Yet the Eleventh Circuit rejected plaintiffs' argument not because knowledge of facts showing scienter was unnecessary, but because under the facts of that case, an inference of scienter was clear where, after repeated public statements of financial health, the defendant abruptly filed for bankruptcy. *Theoharous*, 256 F.3d at 1223. The unanticipated

bankruptcy filing demonstrated that "previous reports of solid financial health were inaccurate," and placed investors on notice "of the possibility *that [defendant] had violated Section 10(b).*" *Id.* at 1228 (emphasis added).

In *Tello I*, the Eleventh Circuit more recently declared: "Inquiry notice in our circuit as to securities fraud occurs when a potential plaintiff discovers facts evidencing securities *fraud.*" *Tello I*, 410 F.3d 1275, 1289 (11th Cir. 2005) (emphasis added). The court refused to find as a matter of law that certain media items had placed plaintiffs on inquiry notice of the fraud alleged in the complaint, remanding the case to the district court for a factual determination of whether

> *sufficient information was provided by these sources to cause the class members to realize that [defendant] had committed securities violations* that negatively affected their investments [and] to enable them to file a lawsuit, bearing in mind that many, if not most, of the class members are likely lay persons unknowing about the intricacies of the securities laws as to what constitutes a securities violation as opposed to simply losing money because of a market decline.

Id. at 1291 (emphasis added); *see also La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 847 (11th Cir. 2004) (reversing statute-of-limitations dismissal where the facts available to plaintiffs could be explained by "reasons other than fraud" and were thus insufficient to create inquiry notice of fraud).

Citing *Sterlin v. Biomune Systems, Inc.*, 154 F.3d 1191, 1196, 1203 (10th Cir. 1998), the Solicitor General as *amicus curiae* in *Betz* suggests that know-

ledge of facts showing scienter is not a prerequisite to inquiry notice in the Tenth Circuit. Brief for the United States as *Amicus Curiae* at 17 in *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. Apr. 22, 2009). But that is simply wrong. In fact, *Sterlin* holds that "inquiry notice . . . triggers an investor's duty to exercise reasonable diligence and . . . the . . . limitations period begins to run once the investor, in the exercise of reasonable diligence, *should have discovered the facts underlying the alleged fraud.*" 154 F.3d at 1201 (emphasis added). While inquiry notice could be triggered by something less than "indisputable proof," the Tenth Circuit found, the facts nevertheless had to "alert a reasonable investor to the possibility of *fraud*." *Id.* at 1203-04 (emphasis added). On the facts before it, the Tenth Circuit found that a *Barron's* article which disparaged the defendant company's founder, stating there was a "'one in 100 chance'" that the company was engaged in a legitimate business venture, and suggesting the company's true purpose was only "'to sell shares,'" contained sufficient information to place investors on inquiry notice of fraud. *Id.* at 1202-03. Although the article did not "discuss each and every aspect of the alleged *fraudulent* activity," the court stated, "a reasonable investor would have investigated further after reading" it. *Id.* at 1204. More than merely contradicting defendants' statements, the *Barron's* article assailed their integrity. Indeed, it would be hard to describe the article as suggesting anything other than fraud. *Cf. Berry*, 175 F.3d at 705 & n.8 (contrasting *Barron's* article in *Sterlin* with one that did not "challenge[] . . . [defendant's] honesty or good faith").

The *Sterlin* decision is one that other circuits have favorably cited—and followed.[7] Tellingly, Petitioners themselves lump the Tenth Circuit's *Sterlin* opinion with the law of "the First, Sixth, Seventh and Tenth Circuits," where "the limitations period appears to commence on the date when the plaintiff becomes aware, through 'storm warnings' or otherwise, of the possibility that *it has been defrauded* and, having exercised reasonable diligence, should have discovered *the facts underlying the fraud*." Pet. 14 (citing *Sterlin*, 154 F.3d at 1201) (emphasis added).

Petitioners say the Seventh Circuit in *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), "rejected the plaintiff's argument that it was not put on inquiry notice by the revelation of misrepresentations that arguably were not the product of fraud." Pet. 23. In fact, the Seventh Circuit held that the plaintiffs "should have begun *suspecting fraud* many years earlier" than they did, and cautioned:

> Inquiry notice . . . must not be construed so broadly that the statute of limitations starts running too soon for the victim of the fraud to be able to bring suit within a year. The facts constituting such notice must be *sufficiently probative*

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[7] *See, e.g., Young v. Lepone*, 305 F.3d 1, 10 (1st Cir. 2002); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005); *Rothman v. Gregor*, 220 F.3d 81, 97 (2d Cir. 2000); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir.2002); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 870 (9th Cir. 2008); *Berry v. Valence Technology, Inc.*, 175 F.3d 699, 704 (9th Cir. 1999); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 n.5 (10th Cir. 1999); *Tello I*, 410 F.3d 1275, 1285 (11th Cir. 2005).

> *of fraud—sufficiently advanced beyond the stage of a mere suspicion*, sufficiently confirmed or substantiated—not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.

Fujisawa, 115 F.3d at 1335 (emphasis added). The court added that inquiry notice has a "generous" meaning, and requires that plaintiff be "in possession of, or with ready access to, the *essential facts* that he needs in order to be able to sue." *Id.* at 1337 (emphasis added). The "essential fact" that was missing here, the Third Circuit found, was any indication of Respondents' scienter. Pet. App. 13a-14a. *Fujisawa* supports this finding.

The Seventh Circuit refined its inquiry-notice analysis in *Law*, finding that an investor who knows defendant has made an "untrue statement" is not placed on inquiry notice of potential §10(b) claims unless the facts available to the investor suggest the statement was *knowingly* false. *Law*, 113 F.3d at 785-86. Other circuits have echoed the Seventh Circuit's reasoning—often with explicit reference to *Fujisawa* and *Law*.[8]

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[8] *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 253 (3d Cir. 2001) (citing *Fujisawa*, 115 F.3d at 1335); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 (3d Cir. 2006) (same); *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 543 F.3d 150, 164 (3d Cir. 2008) (same); *Ritchey v. Horner*, 244 F.3d 635, 640-41 (8th Cir. 2001) (same); *Tello I*, 410 F.3d 1275, 1284 (11th Cir. 2005) (same); *Sudo Props. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371, 377 (5th Cir. 2007) (investor not on notice of §10(b) claims where he had no information to suggest he had been *deliberately* misled); *Berry v. Valence Technology, Inc.*, 175 F.3d 699, 705 (9th Cir. 1999) (article that did not

The decisions holding that an investor is not placed on inquiry notice of §10(b) claims unless she is aware of facts suggesting "malfeasance," "intentional impropriety," or "fraud" do not, as Petitioners worry, "eliminate[] the concept" of inquiry notice. Pet. 17 (citing *Betz*, 519 F.3d at 878; *Merck*, 543 F.3d at 166). A careful reading of the decisional law belies the existence of the "split of authority" portrayed by Petitioners.

Finally, despite their insistence that "Respondents' claims . . . are viable today only because the Third Circuit departed" from its sister circuits, Pet. 17, Petitioners do not show that any other circuit court would have decided this case differently. That cases cited by Petitioners have had varying outcomes does not illustrate a split of authority with regard to inquiry notice. Rather, it demonstrates, as courts have long recognized, that the issue of when a plaintiff is on notice of her claims—an affirmative defense on which the defendant bears the burden of proof—is intensely fact-driven, and as such not normally suited to summary disposition.[9] The determination is

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challenge "the *honesty or good faith*" of defendant's directors was insufficient to place investor on inquiry notice) (emphasis added); *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 194 (2d Cir. 2003) (amended financial statements did not place investors on inquiry notice of §10(b) claims, because they "did not contain *any* indication that fraud was being perpetrated") (emphasis in original).

[9] *See Young*, 305 F.3d at 9 ("The multifaceted question of whether storm warnings were apparent involves issues of fact."); *Lentell*, 396 F.3d at 169 (recognizing "the fact-specific nature of the limitations defense, particularly where the claim is foreclosed by inquiry notice"); *Davis v. Grusemeyer*, 996 F.2d 617, 623 n.10 (3d Cir. 1993) ("the applicability of the statute of limitations usually implicates factual questions as to when

one that, like materiality, "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

D. The Decision Below Does Not Thwart the Purpose of Inquiry Notice

Petitioners say that the Third Circuit's "departure" from established precedent creates a "standard [that] encourages a plaintiff to sit on its hands notwithstanding evidence of possible fraud and wait for information sufficient to plead a claim to appear fortuitously." Pet. 17-18.

Yet all courts recognize that statutes of limitation must

> strike[] a balance between two competing policies underlying the securities laws. While we recognize there is a strong federal interest in requir-

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plaintiff discovered or should have discovered the elements of the cause of action"); *Great Rivers*, 120 F.3d at 897 ("the determination of awareness [of storm warnings] is by its terms a factual analysis"); *Ritchey*, 244 F.3d at 640 (issue of whether plaintiffs were on inquiry notice of their claims was "far too factual to be resolved at the summary judgment stage"); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The question of what a reasonably prudent investor should have known is particularly suited to a jury determination."); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1549 (10th Cir. 1996) (remanding to the district court to make a "factual finding" of when plaintiff was on notice of his claims, which was a "necessary prerequisite for determining" whether the claim was timely); *Tello I*, 410 F.3d at 1293 (noting that resolution of statute-of-limitations issue in securities-fraud case requires "factual development").

> ing plaintiffs to file suit soon after they are put on notice of their claims, the applicable statute of limitations should not precipitate groundless or premature suits by requiring plaintiffs to file suit before they can discover with the exercise of reasonable diligence the necessary facts to support their claims.

Sterlin, 154 F.3d at 1202. Indeed, the Eleventh Circuit has observed that "unsubstantiated knowledge is an insufficient basis for filing actions for violations of the securities laws, and, waiting until such facts are developed and available, promotes judicial efficiency and justice." *Tello I*, 410 F.3d at 1287. And the Seventh Circuit cautions against Petitioners' approach to inquiry notice as encouraging "premature and potentially groundless" claims, filed before plaintiff has "obtained 'good evidence of fraud.'"[10]

This concept is universal. For example, the Third Circuit has long embraced these principles, *see Mathews*, 260 F.3d at 251-52, and *Benak*, 435 F.3d at 401, and reiterated them in *Merck*: "In this vein, we have emphasized that '[u]ndergirding the inquiry notice analysis is the assumption that a plaintiff either was or should have been able, in the exercise of

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[10] *Marks*, 122 F.3d at 370 (quoting *Law*, 113 F.3d at 786). *See also Mathews*, 260 F.3d at 253 (discouraging a broad interpretation of inquiry notice which would cause "a flood of untimely litigation"); *Young*, 305 F.3d at 9 (noting competing interests of "the staunch federal interest in requiring plaintiffs to bring suit promptly" and "the equally strong interest in not driving plaintiffs to bring suit prematurely, that is, before they are able . . . to discover the facts necessary to support their claims"); *New England Health Care*, 336 F.3d at 501 (acknowledging the need for "an appropriate balance" between these interests) (citing *Young*, 305 F.3d at 9).

reasonable diligence, to file an adequately pled securities fraud complaint as of an earlier date.'" 543 F.3d at 164 (quoting *Benak*, 435 F.3d at 401). In fact, as the Third Circuit observed below, such a requirement is "suggested" by the Private Securities Litigation Reform Act ("PSLRA"). Pet. App. 18a. The court explained: "A rule that would place investors on inquiry notice of fraud the moment that the FDA questions the seemingly good faith scientific analysis of a pharmaceutical company would encourage putative plaintiffs to file premature securities suits. In imposing heightened pleading requirements, Congress evinced an intent to discourage such suits . . . ." *Id.; accord Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 104 (2d Cir. 2003); *Lentell*, 396 F.3d at 171; *see also Law*, 113 F.3d at 785 (noting that the unavailability of equitable tolling, coupled with the strict pleading requirements of the PSLRA, made it "extremely important" to determine what information the investor must possess to trigger inquiry notice).

Petitioners identify no conflict among the precedents, since all comport with Congress' intention that the limitations period should commence only upon "the discovery of the facts constituting the violation." 28 U.S.C. §1658(b)(1).

E. Petitioners Misconstrue *Basic v. Levinson*

Petitioners also say that "the Third Circuit's holding is inconsistent with the 'efficient market' theory adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)." Pet. 25. Petitioners say *Basic* "established a 'fraud on the market' presumption of reliance in Section 10(b) actions based on the hypothesis that all information about a security, which is traded in an efficient market, is incorporated into the price of that security." Pet. 25. Thus,

Petitioners conclude, a reasonable investor must know everything that is publicly available and incorporated into a stock's price. In other words, because a reasonable investor knew that Pharmacia stock closed at $49.82 on February 8, 2001, *ipso facto* she is also deemed to know everything about that company that in any way affected its market price. JA:1287. This is not the holding of *Basic*.

First, *Basic* never adopted the strict-efficiency principle that Petitioners hypothesize. *Basic* holds that investors are entitled to rely upon the "integrity" of market prices, to be free of the effects of manipulation by fraud, *Basic*, 485 U.S. at 247, whether or not the market is truly "efficient" in any strict sense:

> We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.

Id. at 246 n.24. "By accepting this rebuttable presumption," this Court explained, "we do not intend conclusively to adopt any particular theory of how quickly and completely publically available information is reflected in market price." *Id.* at 248 n.28. The understanding that securities prices may be manipulated by fraud, and that those who rely on its integrity may suffer, predates the concept of market efficiency. *See* Adolf A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); Adolf A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 394-95 (1938);

Rex v. De Berenger, 3 M. & S. 67, 105 Eng. Rep. 536 (1814); *United States v. Brown*, 5 F. Supp. 81, 85-89 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

Second, rather than imputing to a reasonable investor knowledge of all facts affecting a stock's price, *Basic's* fundamental premise is that reasonable investors may *be unaware* of the specific disclosures that in fact affect the market price on which they rely. This Court stated in *Basic*:

> Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. It has been noted that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs *on the integrity of the market price may be presumed*. Commentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory. An investor who buys or sells stock at the price set by the market does so in reliance *on the integrity of that price*. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

485 U.S. at 246-47 (footnotes and citation omitted; emphasis added).

The genius of free markets is that prices reflect more information than a human mind can hope to comprehend. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 525-26 (1945). *Basic* does not presume that reasonable investors actually know all information in the public domain, or even that they *should* know it all. Rather, *Basic* adopts the approach the Ninth Circuit articulated in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975):

> A purchaser on the stock exchange may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations.

Id. at 907. Thus, as this Court held in *Basic*, the "'causal nexus'" embodied in the element of reliance "'can be adequately established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock.'" *Basic*, 485 U.S. at 245 (quoting *Blackie*, 524 F.2d at 908).

Far from imputing knowledge to investors, as Petitioners would do, this approach allows investors to rely on the market's integrity without knowing all the information that market price incorporates.

F. The Third Circuit Applied *Tellabs* to Petitioners' Motion to Dismiss

Petitioners say that certiorari is warranted because the Third Circuit "completely overlook[ed]" this Court's ruling in *Tellabs*, 551 U.S. 308. Pet. 29. They also say that "Respondents' scienter allegations consist of only two paragraphs" which fail to adequately allege scienter. Pet. 31. Neither assertion is accurate.

In *Tellabs*, this Court directed courts ruling on a motion to dismiss for failure to meet the stringent pleading requirements of 15 U.S.C. §78u-4(b)(2), to review the complaint *in its entirety*, and to determine whether the facts pleaded therein give rise to a "strong" inference of scienter as compared to non-culpable inferences. 551 U.S. at 321-24. A complaint will survive this scrutiny where "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324. *Tellabs* directs courts to "assess all the allegations holistically," rather than nitpicking the complaint paragraph by paragraph. *Id.* at 326.

Contrary to Petitioners' assertion that the Third Circuit "completely disregarded *Tellabs*," Pet. at 29, the panel in fact followed *Tellabs* explicitly. After a lengthy inquiry-notice analysis, the court went on to find:

> The District Court correctly denied defendants' motion to dismiss. In that motion, defendants asserted that the plaintiffs failed to meet the pleading requirements of the PSLRA, focusing on the admittedly thin two paragraphs of the Amended Complaint labeled "Scienter Allegations." *When examined as a whole, however, the*

> *Amended Complaint is replete with allegations that defendants acted with the requisite scienter. See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007) (requiring courts to "consider the complaint in its entirety").

Pet. App. 19a (emphasis added). The court continued: "In particular, the Amended Complaint documents the alleged scheme to trick *JAMA*, and thus the investment community, by using only the truncated data." Pet. App. 19a.

Petitioners say that this Court's review is warranted because the Third Circuit failed to engage in a "comparative analysis" of the competing inferences raised by the facts in the complaint, including the possibility that the facts presented a legitimate scientific disagreement. Pet. 32-34. But the Third Circuit's opinion emphasizes this very balancing:

> While it is true that a legitimate disagreement over scientific data does not give rise to a securities fraud claim, plaintiffs alleged something quite different: a bad faith misrepresentation of scientific data. Those allegations are sufficient to withstand the "[e]xacting pleading requirements" of the PSLRA, which require that the allegations give rise to a strong inference of scienter. *See, e.g., Tellabs, Inc.*, 127 S. Ct. at 2504-10.

Pet. App. 20a.

The Third Circuit was faithful to *Tellabs*.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Petitioners have failed to demonstrate that the decision below conflicts with statutory text, authority from this Court, or precedent from the other federal appellate courts.

Respectfully submitted,

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